SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1371

SIGMUND GOLDBLATT, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY

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PETITIONER'S REPLY

The present petition is not a rehash of the unsuccessful petition filed last term. While the *ex post facto* effect remains in the case, the intervening opinion in *Nardello* required a significant reevaluation of the majority holding below, as Judge Winter pointed out (Pet. App. A at 4a). Compelled by *Nardello* to apply Virginia law, the majority purported to do so but (1) refused to follow the authoritative construction of Virginia's bribery statute as announced by her highest court and (2) thought itself empowered to view the substantive elements of state criminal statutes "generically" (Pet. App. A at 3a). This holding

raises entirely different problems from those tendered last term.

Significantly, the Government makes no effort to sustain the rationale of the court below, nor does it deny that the "generic element" test announced in the prevailing *per curiam* is so uncertain and vague as to render § 1952 constitutionally infirm. What the Government does say is that petitioner's conviction for conspiracy should nonetheless be upheld on the basis of a theory different from that adopted below.

1. The Government notwithstanding (G. Memo. at 2, 6), the object of the conspiracy charged in this case was *not* to secure a rezoning. The sole object charged was a violation of 18 U.S.C. § 1952(a)(3), *i.e.*, the use of interstate facilities with the intent to "establish and carry on" a bribe in violation of Virginia law (CA 2-3). The indictment could charge no other object for it is fundamental that the object of a conspiracy under 18 U.S.C. § 371 to commit a particular substantive offense is *always* the substantive offense itself. *Gebardi* v. *United States*, 287 U.S. 112, 120 n.4; *United States* v. *Britton*, 108 U.S. 199, 205-207.[1] Moreover, a "conspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." *Ingram* v. *United States*, 360 U.S. 672, 678. Accordingly, the conspiracy count here cannot be divorced from the substantive offense.[2]

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[1] See also, *United States* v. *Konovsky*, 202 F.2d 721, 725 (7 Cir. 1953); *Fulbright* v. *United States*, 91 F.2d 210, 212 (8 Cir. 1937); *Galatas* v. *United States*, 80 F.2d 15, 17 (8 Cir. 1935).

[2] The Government makes no effort to sustain petitioner's conviction on the substantive count. See 392 F. 2d at 348 n. 6. That petitioner received a concurrent sentence on that count may not be determinative. *Benton* v. *Maryland*, No. 201 (Oct. T. 1968).

2. Section 1952(a)(3) requires three items of proof. First, the Government must show that the defendant used an interstate facility. Second, the Government must show that such use was accompanied with an intent to "promote, manage, establish, carry on or facilitate [the] promotion, management, establishment, or carrying on" of bribery *in violation of state law*. And third, the Government must show that following the use of interstate facilities with the proscribed intent, the defendant committed an act to "promote, manage, establish, carry on or facilitate [the] promotion, management, establishment, or carrying on" of bribery *in violation of state law*.

Since § 1952(a)(3) does not require a completed state crime, the Government correctly asserts that the "federal offense may be committed before the elements minimally necessary for state prosecution have occurred" (G. Memo. at 6). But it does not follow that a § 1952(a)(3) offense may be committed *afterwards*. One cannot use an interstate facility with intent to commit a crime which has already been committed. One cannot "thereafter" do an act to further commission of a crime that has already been committed.[3] Nor can one conspire to do so. Thus, the court below correctly identified the crucial inquiry: "'[t]he issue that divided us before was that of the duration of bribery

[3] The statute does not proscribe conduct "designed to 'carry on' the scheme that reaches its climax—but not its denouement—with the corrupt offer" (G. Memo. p. 6), it proscribes conduct to "carry on" bribery in violation of State law. "Carry on" means "to advance, or help forward, continue * * * keep up; as, to carry on a design." Webster's New International Dictionary (2d ed. 1961). Cf. *Cooper Mfg. Co.* v. *Ferguson*, 113 U.S. 727, 735-736. As with the travel, intent and "thereafter" elements, one cannot advance or help forward a crime that has already been advanced to completion.

admittedly prohibited by the State of Virginia—whether it extended to that point in time at which the zoning corruption was accomplished" (Pet. App. A at 2a). Or, in the words of *Nardello*, the question is whether "the particular State involved prohibits the * * * activity charged." 393 U.S. at 295.

The activity prohibited by Virginia's bribery statutes, as the Government finally concedes (G. Memo. at 2, 6-7), is the giving or receipt of a bribe. And, as the Government also concedes, that bribe was both given and received before § 1952 became law (G. Memo. at 2-3). Nothing thereafter could undo the crime of bribery, and nothing thereafter was prohibited by the Virginia bribery statutes specified in the indictment (CA 2-3), or by any other Virginia statute. Accordingly, petitioner's conviction was barred by the *ex post facto* clause unless, as the majority below held, federal courts are free to view the substantive elements of state crimes "generically" (Pet. App. at 3a).

3. Finally, the Government's reliance (G. Memo. at 6, 7) on *United States* v. *Kubacki*, 237 F. Supp. 638, is startling. *Kubacki* was a prosecution under § 1952(a)(1) for *distributing* the proceeds of a bribe in interstate commerce. 237 F. Supp. at 640 and n.2. Obviously, one cannot distribute the proceeds of a bribe until after it has been paid. 237 F. Supp. at 643. But, petitioner was convicted for conspiracy to violate § 1952(a)(3) (G. Memo. at 2). If the Government is now arguing that that conviction can be sustained on a *Kubacki* rationale under § 1952(a)(1), *Cole* v. *Arkansas*, 333 U.S. 196, will have to be overruled.

CONCLUSION

Squarely posed in this case is a question bound to recur not only under § 1952, but under the many other federal criminal statutes which incorporate, assimilate or refer to state statutes as essential ingredients of federal crimes. This case, overlaid with the constitutional urgency of the *ex post facto* problem, presents an appropriate and compelling vehicle for resolution of that question. The petition for writ of certiorari should be granted.

Respectfully submitted,

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